89-1297

NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL.,
Petitioners

VERSUS

ROBERT GUIDRY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 26, 1990

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a union's discriminatory refusal to refer its members to jobs constitutes "discipline" within the meaning of sections 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C. §§411(a)(5) and 529?

2) Whether the LMRDA authorizes an award of punitive damages to a prevailing plaintiff?

3) Whether the LMRDA authorizes an award of damages for emotional distress and if so, what type of evidence will constitute a sufficient basis for the awarding of such damages?

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PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, International Union of Operating Engineers, Local 406 ("the Union"), Willard Carlock, Sr., Peter Babin, III, Don Schiro and C.J. Laird, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit on the questions presented.

I. OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Cir-

cuit is reported at 882 F.2d 929. (A-1).[1] The opinion of the district court is reported at 669 F.Supp. 763 (W.D. La. 1987). (A-33).

II. JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1989. Timely petitions for rehearing and rehearing en banc were denied on September 28, 1989. (A-93). Petitioners' timely motion for enlargement of time to file this petition was granted on December 21, 1989, extending the date for filing to January 27, 1990.

This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254 (1).

III. STATEMENT OF STATUTES INVOLVED

The questions presented for review involve sections 101 (a)(5) and 609 of the Labor-Management Reporting and Disclosure Act ("the LMRDA"), 29 U.S.C.§§411 (a)(5) and 529, the text of which are set forth in the appendix hereto.

IV. STATEMENT OF THE CASE

Robert Guidry was a member of the Union, which is a state-wide union with six district offices, including one located in Lake Charles, Louisiana. Pursuant to various collective bargaining agreements, the Union operates hiring halls at its main office in New Orleans and district offices, through which it refers both members and non-members of the Union to construction employment. The Union maintains out-of-work lists at its offices of individuals who wish to be referred to jobs. The lists contain

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[1] Reference to the Appendix will be "A-_____."

names in the order applicants notify the Union he or she is available for work.

Guidry had a history of opposing incumbent Union officers, including Carlock and Laird, the business agents appointed to operate the Lake Charles district office and its hiring hall. Guidry sought employment through the Lake Charles hiring hall. In order to quell Guidry's opposition, Carlock "exploited and, at times, disregarded entirely the hiring hall procedures to enrich his confederates to the detriment" of Guidry (A-44).

Guidry brought suit for redress of, among other things, the hiring hall discrimination, asserting that the hiring hall discrimination constituted discipline under sections 101(a)(5) and 609 of the LMRDA, 29 U.S.C.§§411(a)(5) and 529.

The district court concluded that "the defendants [petitioners herein] violated sections 411(a(5) and 529 by limiting the employment opportunities made available to the plaintiffs to penalize them for refusing to support the defendants and for openly opposing them" (A-63). It awarded Guidry his back wages, punitive damages, damages for emotional distress and attorney's fees for the LMRDA violation.[2]

The Court of Appeals affirmed the district court in substantially all of its holdings, reversing on the award of

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[2] The district court found that the hiring hall discrimination was also a violation of section 301 of the Labor Management Relations Act ("the LMRA"), 29 U.S.C. §185. It noted back wages were the appropriate remedy under the LMRA, but that punitive damages were prohibited by this court in *Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). (A-60, 70).

attorney's fees and its findings on the appropriate LMRDA statute of limitations. It concluded that discipline within the meaning of sections 101(a)(5) and 609 had occurred because "Guidry's name was repeatedly skipped over on the out-of-work list in retaliation for his outspoken opposition to Union leadership" (A-23). Relying on existing Fifth Circuit precedent, it affirmed the award of punitive damages under the LMRDA. The Court of Appeals, on an issue of first impression for it, held that damages for emotional distress are available under the LMRDA upon a showing of "some evidence of actual injury" (A-28, 29). "Actual injury," it determined, may be proven "through lost wages" (A-29, 30). Because the appeals court found the statute of limitations to be one year rather than six months, it remanded the matter to the district court for recomputation of backpay. As the district court had based its emotional distress and punitive damage awards on the amount of backpay due, the Fifth Circuit also vacated the award of punitive damages and damages for emotional distress for recomputation. (A-28, 30).

V. JURISDICTION OF THE DISTRICT COURT

Jurisdiction in the district court, the United States District Court for the Western District of Louisiana, Lake Charles Division, was based upon sections 101 and 609 of the LMRDA, 29 U.S.C.§§411 and 529.

VI. REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT'S CONCLUSION THAT HIRING HALL DISCRIMINATION COMMITTED BY UNION OFFICERS ON AN AD HOC BASIS IS "DISCIPLINE" WITHIN THE MEANING OF SECTIONS 101 (a)(5) and 609 OF THE LMRDA CONFLICTS DIRECTLY WITH A RECENT DECISION OF THIS COURT

In *Breininger v. Sheet Metal Workers Local Union No. 6*, _____ U.S. _____, 110 S.Ct. 424, 438-440 (1989) (Stevens and Scalia, J.J., dissenting in relevant part), the court held that a union's refusal to refer a member to employment through the hiring hall as a result of his opposition to the union's leadership does not give rise to a claim under sections 101(a)(5) and 609 of the LMRDA. As in the instant matter, the case turned on the phrase "otherwise discipline" which appears in both sections and has the same meaning. 110 S.Ct. at 438 n. 13, citing *Finnegan v. Leu*, 456 U.S. 431, 439 n.9, 102 S.Ct. 1867, 1872 n.9, 72 L.Ed.2d 239 (1982). The court interpreted the term "discipline" to mean only punishment authorized by a union as a collective entity to enforce its rules, undertaken under color of the unions's right to control the member's conduct in order to protect the interests of the union or its membership. 110 S.Ct. at 439. Parsing the structure of the statute, the court found that section 101(a)(5) protects members from improper discipline imposed by the union as an entity, through its tribunals, "rather than ad hoc retaliation by individual union officers." 110 S.Ct. at 439 n.15, 440.

The opinion of the Court of Appeals in the instant matter, which issued prior to this court's opinion in *Breininger*, determined that retaliatory hiring hall discrimination by individual agents of the Union was within the ambit of sections 101(a)(5) and 609, rejecting the Union's contrary argument. It agreed with the district court's finding that business agent Carlock had used the hiring hall "to penalize Guidry . . . for [his] refusal to support the defendants." (A-14-15). It noted that there was "substantial evidence . . . of the attitude of Carlock toward those members who had 'voted wrong' in prior elections . . . [and] that the discrimination was intentional." (A-15). It expressly affirmed "the district court's conclusion that dis-

crimination in the hiring hall took place and was used in retaliation for Guidry's failure to support Union leadership." (A-16).

Breininger squarely rejected the Fifth Circuit's conclusion of law, and warrants reversing it. As in *Breininger*, Guidry was, with respect to the hiring hall discrimination, the victim of a personal vendetta of a union officer, Carlock. "The opprobrium of the union *as an entity*, however, was not visited upon [Guidry]," 110 S.Ct. at 440 (emphasis in original), with respect to the Union's hiring hall.[3] "While a suspension of job referrals through the hiring hall could qualify as 'discipline' if it was imposed as a sentence on an individual by a union in order to punish a violation of union rules," 110 S.Ct. at 439 n.15, no such sentence or directive was ever issued by the Union as an entity.[4] Since Guidry "was not punished by any tribunal, nor was he the subject of any proceedings convened by [the

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[3] The district court found, and the appellate court affirmed, that Guidry was expelled from union membership by a biased Union tribunal which Laird personally stacked against Guidry, in violation of section 101 (a)(5), for crossing a picket line and working on a "non-union" job. Referrals to employment are available to individuals regardless of membership, pursuant to the NLRA. *See United Ass'n. of Journeymen, Local 198 v NLRB*, 747 F.2d 326 (5th Cir. 1984), and no evidence was adduced by Guidry that his expulsion had any impact upon his ability to obtain employment. The last act of hiring hall discrimination against Guidry, as found by the district court, occurred on April 19, 1983. (A-90). The Union filed charges in October 1983 against Guidry for crossing the picket line in August 1983, and thereafter expelled him. In 1984, he entered the trucking business and did not seek referrals from the hiring hall from 1984 through 1986. (A-53). Carlock was fired on March 10, 1984 and C.J. Laird resigned on January 15, 1985 (A-3, 4).

Petitioners do not seek certiorari on the expulsion issue.

[4] There is no evidence that the Union as an entity embarked on a campaign to discriminate against Guidry.

Union] . . . [Guidry] has not alleged a violation of §§101(a)(5) and 609," 110 S.Ct. at 440, and the Court of Appeals erred as a matter of law by finding that ad hoc retaliatory hiring hall discrimination by individual business agents stated a cause of action thereunder.[5]

Petitioners submit that the holding of the Fifth Circuit is in indistinguishable conflict with the holding of this court in *Breininger.* A writ of certiorari to the Court of Appeals should issue; the court should summarily reverse and vacate the opinion and judgment of the Fifth Circuit; and the matter should be remanded for consideration in light of the court's ruling in *Breininger.*[6]

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[5] In his complaint, Guidry did not allege a violation of section 102 of the LMRDA, 29 U.S.C. §412, and the issue of whether his rights secured by the LMRDA were "infringed" by the operation of the hiring hall was not litigated below. The Court of Appeals, in dicta, stated that:

> Because we find that a violation of section 609 has occurred here, it is clear that this suit could also be maintained under section 102. This does not, however, affect the result here. (A-18, 19 at n.6).

The 609 violation to which it referred was the operation of the hiring hall. Since the appeals court's construction of section 609 is erroneous, it necessarily follows the above dicta is of no moment. In *Breininger,* this court declined to pass on the section 102 issue because, as here, the issue was not presented to or decided by the appellate court. 110 S.Ct. at 440 n.18. It should be noted that section 102, which provides an independent authority for suit against a union based on an alleged violation of the Title I of the LMRDA, *Finnegan,* 456 U.S. at 439, 102 S.Ct. at 1872, appears to be narrower in scope than sections 101(a)(5) and 609.

[6] The remaining questions raised *infra* flow from the finding that the discriminatory operation of the hiring hall violated the LMRDA. That is, the damages for emotional distress and punitive damages flowed from the loss of income caused by the hiring hall discrimination. (A-28,

B. THE AWARD OF PUNITIVE DAMAGES UNDER THE LMRDA CONFLICTS WITH RECENT DECISIONS OF THIS COURT CONCERNING RELATED STATUTES, AND IMPOSES THE RISK ON UNION MEMBERS OF THEIR UNION BEING CRIPPLED BY SUCH AN AWARD

The Court of Appeals, relying on its precedent, affirmed the award of punitive damages under the LMRDA against the Union and Babin. *Parker v. Steelworkers Local 1466*, 642 F.2d 104 (5th Cir. 1981) and *Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968). *Parker* and *Braswell* hold that where a union acts with actual malice or reckless or wanton indifference to the rights of a plaintiff, punitive damages may be awarded. The award of punitives against the Union stemmed from the ad hoc actions of Carlock and Laird, primarily the operation of the hiring hall and income lost thereby. Babin was sanctioned for failing to monitor adequately the actions of Carlock and Laird.

The LMRDA is silent on awards of punitive damages. However, in *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979), the court held that punitive damages could not be assessed under section 301 of the Labor Management

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Footnote 6 continued

30; 67-68, 72). Should the court grant the writ of certiorari on the LMRDA question, and remand the cause to the Court of Appeals, it may also remand on the issues of damages for emotional distress and punitive damages; if no LMRDA violation occurred, under the rationale utilized by the appeals court and the district court, damages for emotional distress or punitive damages might not be awarded, obviating the need for review at this time.

Relations Act ("the LMRA"), 29 U.S.C. §185, against a union which breaches its duty of fair representation, whether the action flowed from the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, or the Railway Labor Act, 45 U.S.C. § 151 *et seq.* In rejecting the argument that punitive damages are appropriate under section 301 because "actual damages caused by a union's failure to pursue grievances may be *de minimis*" and therefore "a strong legal remedy is essential to ... inhibit union misconduct," *id.*, 442 U.S. at 48, 99 S.Ct. at 2126, the court concluded that punitive damages awards "could unsettle the careful balance of individual and collective interests .... in the unfair representation area." *id.* Punitive damages may result in windfall recoveries for plaintiffs with little actual damages, and "such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is too great a price for whatever deterrent effect punitive damages may have." *id.*, 442 U.S. at 50-51, 99 S.Ct. at 2127. This rationale applies with equal force to suits brought under the LMRDA, *Foust*, 442 U.S. at 59, 99 S.Ct. 2131 (Blackmun, J. concurring in the result, with whom Burger, C.J., and Rehnquist and Stevens, J.J., joined).

Noting the LMRDA's silence on punitive damages, the Fifth Circuit discovered that there is "nothing in the legislative history of the LMRDA which touches directly on this question." *Braswell*, 388 F.2d at 200. The absence of a statutory provision authorizing a plaintiff to recover punitive damages or, *inter alia*, of any legislative history indicating Congress intended to create a private right of action for punitive damages, lead this court to conclude that punitive damages were not available under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq. Massachusetts Mutual Life Ins. Co. v.*

Russell, 473 U.S. 134, 144-146, 148, 105 S.Ct. 3085, 3091-93, 87 L.Ed. 2d 96 (1985). The remedial provision of the LMRDA, section 102, is similar to ERISA's remedial provision for breaches of fiduciary duties to plan participants, 29 U.S.C. §1109.

Similar results were reached in *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940)(holding the NLRB could not assess punitive damages as it was not expressly authorized to do so by Congress), and *Teamsters v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964)(holding punitive damages could not be recovered under section 303 of the LMRA, 29 U.S.C. §187, for a union's impermissible secondary boycott). Because the remedial provisions of Title VII of the Civil Rights Act of 1964 are patterned after the NLRA, *Ablemarle Paper Company v. Moody*, 422 U.S. 405, 419, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), it appears punitive damages are not available under Title VII.[7]

Although the Fifth Circuit has stated that Congress' declaration of the purpose of LMRDA -- "to eliminate or prevent improper practices on the part of labor organizations"--justified the award of punitive damages, *Braswell*, 388 F.2d at 200, ERISA was also enacted to curb abuses affecting employees -- *inter alia*, the termination of pension plans by employers which disenfranchised employees from their expected pensions. *See PBGC v. R.A. Gray Co.*, 467 U.S. 717, 720-21, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984); *Allesi v. Raybestos-Manhattan, Inc.*, 401 U.S. 504, 510-11, 101 S.Ct. 1895, 1899-1900, 68 L.Ed. 2d. 402

[7] Compare the Fair Labor Standards Act, 29 U.S.C. §§216 and 217, which authorizes liquidated damages, incorporated into the Age Discrimination in Employment Act, 29 U.S.C. §626(b).

(1981).[8]

Whether punitive damages are available under the LMRDA has a far reaching impact upon labor organizations. Punitive damages may be awarded by juries "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . . Community hostility toward unions, management or minority views can thus find expression in punitive awards." *Foust*, 442 U.S. 50 n.14, 99 S.Ct. 2127 n. 14.[9] The issue is an important question of federal law which was not decided by *Foust*, 442 U.S. at 47 n.9, 99 S.Ct. 2125 n.9, and which should now be settled by the court.[10]

C. THE LMRDA DOES NOT AUTHORIZE AN AWARD OF DAMAGES FOR EMOTIONAL DISTRESS

Presented with an issue of first impression for the

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[8]Union officers have fiduciary duties to the membership similar to the duties imposed upon ERISA trustees, under section 501 of the LMRDA, 29 U.S.C. §501. *See Bloom v. Teamsters*, 752 F.2d 1312 (9th Cir. 1984).

[9] Alleged violations of sections 101 and 102 have been tried to juries, as have damages issues. *See, e.g., Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373 (8th Cir. 1978); *Keene v. Operating Engineers Local 624*, 569 F.2d 1375 (5th Cir. 1978).

[10]Although most courts of appeals reaching this issue have found punitive damages appropriate under the LMRDA, *Braswell*, 388 F.2d 193; *Cook v. Orange Belt Dist. Council*, 529 F.2d 815 (9th Cir. 1976); *Morrissey v. NMU*, 544 F.2d 19 (2d Cir. 1976), the Sixth Circuit has questioned the availability of such damages, *McGraw v. Plumbers and Pipefitters*, 341 F.2d 705 (6th Cir. 1965). The courts of appeals were also virtually unanimous in finding punitive damages available under the LMRA, which this court rejected in *Foust*, 442 U.S. at 58, 99 S.Ct. at 2131 (Blackmun, J., concurring in the result).

Fifth Circuit, the Court of Appeals, relying on precedent of other courts of appeal, summarily concluded that damages for emotional distress are recoverable under the LMRDA. (A-28). It imposed a broad "actual injury" requirement, which allows "lost wages as well as physical manifestations of emotional distress [to] serve [ ] as sufficient indication of actual injury." (A-29,30). The district court awarded such damages based upon lost wages only; i.e., those wages lost through the discriminatory operation of the hiring hall. (A-30,68).

Petitioners submit damages for emotional distress are not recoverable under the LMRDA. Section 102 of the LMRDA, 29 U.S.C. §412, provides in pertinent part:

> Any person whose rights secured by the provisions of this subchapter may bring a civil action in the district court of the United States for *such relief* (including injunctions) *as may be appropriate.* (emphasis added).

The statute is silent on the award of emotional distress. In the seminal case on this issue, *Boilermakers v. Rafferty*, 348 F.2d 307 (9th Cir. 1965), the court of appeals noted that the only item of legislative history pertinent to the issue is a remark by Senator Goldwater:

> Although the Bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the Bill does not grant him, even where successful in his suit, reasonable counsel fee or other costs.

2 Leg. History, LMRDA 1281.

In *Russell*, 473 U.S. at 138-139, 146, 105 S.Ct. at 3088-89, 3092, the court found similar language in section 409(a) of ERISA, 29 U.S.C. §1109(a), did not authorize "extra-contractual" damages, such as punitive damages and emotional distress.[11] The Court of Appeals has held that Title VII of the Civil Rights Act of 1964 does not permit recovery for emotional distress damages, even though the statute authorizes the court "to order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988). *Accord, Shah v. Mt. Zion Hospital*, 642 F.2d 268 (9th Cir. 1981); *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir. 1981); *DeGrace v. Rumsfield*, 614 F.2d 796 (1st Cir. 1980). *Contra, Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267 (8th Cir. 1981).

In *Farmer v. Carpenters Local 25*, 430 U.S. 290, 305-06, 97 S.Ct. 1056, 1066, 51 L.Ed.2d 338 (1977), the court found that in certain circumstances, a state cause of action against a union for intentional infliction of emotional distress is not preempted by the National Labor Relations Act. It emphasized, however, that this cause of action "cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle ... Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly

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[11] Section 409(a) subjects a fiduciary who breaches his duty to the plan "to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *id.*, 430 U.S. at 305, 97 S.Ct. at 1066. The principles enunciated in *Russell, Farmer,* and by the majority of the courts of appeals concerning Title VII, are equally applicable to the LMRDA. The LMRDA, like ERISA and Title VII, does not expressly authorize recovery of damages for emotional distress, and its legislative history is virtually silent on the issue. The same construction is warranted for the LMRDA. "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. . . . The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Russell,* 473 U.S. at 147, 105 S.Ct. at 3093.

Just as with punitive damages, this issue is worthy of resolution by the court because of its potential for significant impact upon union coffers. As noted *supra,* LMRDA claims are often tried to a jury. A jury by imposition of such an award may, as the Court of Appeals noted, deprive other union members of effective representation. (A-28).

Moreover, with respect to proof of injury, there is a split between the circuit courts of appeals. The Courts of Appeals for the Fifth and Ninth Circuits do not require proof of a physical manifestation of emotional distress; they require only a showing of lost wages and essentially infer emotional distress. (A-29,30). The Court of Appeals for the Second Circuit requires a showing of a physical manifestation of injury, "based upon the plaintiff's physical condition or medical evidence." *Rodonich v. House Wrecker's Union Local 95,* 817 F.2d 967, 978 (2d Cir. 1987). Loss of

income alone is insufficient in the Second Circuit's view to support damages for emotional distress because of the potential impact on a union's treasury occasioned by damages for emotional distress where no actual injury to the plaintiff has occurred. 817 F.2d at 977-78.

VII. CONCLUSION

Based upon the foregoing, a writ of certiorari to the Court of Appeals for the Fifth Circuit is warranted.

Respectfully submitted,

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January 26, 1990

CERTIFICATE OF SERVICE

I hereby certify I have caused three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served upon Maurice L. Tynes, Esquire, Tynes, Fraser & Roach, Post Office Box 4983, Lake Charles, Louisiana 70606-4983 by depositing same in the U.S. mail, first class postage prepaid and properly addressed, this 26th day of January, 1990.

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Jerry L. Gardner, Jr.

Counsel of Record for Petitioners